IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 391 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HARESH @ KALI MOHANDAS VADHWANI

Versus

SUB DIVISIONAL MAGISTRATE

Appearance:

1. Special Criminal Application No. 391 of 2002

MR PRAVIN GONDALIYA for Petitioner No. 1

RULE SERVED for Respondent No. 1

MR VM PANCHOLI, APP for Respondent No. 2

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 21/02/2003

ORAL JUDGEMENT

#. By filing this petition, the petitioner has

challenged his order of externment passed by the Sub-Divisional Magistrate, Anjar. By the impugned order, the petitioner is externed from Kachchh District as well as from Rajkot, Banaskantha and Surendranagar for a period of two years. The said order was confirmed by the appellate authority against which this petition is filed by the petitioner.

#. In the show cause notice issued to the petitioner under Section 59 of the Act dated 28.5.2000 there is a reference of nine cases, which are pending against the petitioner; some of which are under the Indian Penal Code and some of are under the Prohibition Act. In the show cause notice, some particulars are also given about the activities of the petitioner. It is stated that the petitioner is a headstrong person and is also keeping dangerous weapons with him and is known as "Dada" in the area. It is also stated that, he is creating atmosphere of terror and nobody is able to give any statement against the petitioner because of his fear. He was served with the show cause notice accordingly to show cause as to why the externment order should not be passed. Subsequently, after hearing the petitioner, the impugned order at Annexure-B is passed by the Sub-Divisional Magistrate, by which, the petitioner is externed for the period of two years as stated above. The appeal against the same is also dismissed.

#. At the time of hearing of this petition, learned advocate for the petitioner argued that in the show cause notice there is a mention of about nine cases against the petitioner, however, there is no mention about any statements given by any witnesses against the petitioner, in any manner, still, in the impugned order of externment, the authority has considered the fact that certain witnesses have given the statements, but they are not willing to disclose their names out of fear. The authority has observed at page 14 of the impugned order that the statements of witnesses have been recorded, but the complainant is not in a position to remember the names of such witnesses. The said fact is incorporated at serial No.6 wherein certain questions have been replied in the cross-examination by the complainant.

#. Considering the said aspect, it is clear that the authority has recorded the statements of certain witnesses, but their names have not been disclosed since they were not willing to give their names out of fear. Even the appellate authority has observed at page 20 that considering the file of the case and considering the statements of the witnesses, allegation alleged in the

show cause notice against the petitioner is proved. From the aforesaid fact, it is clear that, even though, there is no reference about the statements given by any witness in the show cause notice, the authority has considered the statements of witnesses before passing the impugned order. Learned advocate for the petitioner has relied upon the judgment of the Division Bench of this Court reported in 1990(1) GLH 314 wherein the Division Bench has observed in para 9 as under.:

"Shri Gupta has also stated in his affidavit that the Inspector, Vadi Police Station, Vadodara, had recorded statements of 11 persons in confidence. He further stated that he had applied mind on the relevant material of the case produced before him, which includes the statement of the persons recorded by the police. It is not stated in the notice that the statements of the witnesses were recorded by the police. If at all any such statements would have been recorded and intended to be relied upon, at least, reference of the statements, without disclosing the names, with the time and place of such alleged illegal activities of the petitioner should have been made in the notice so that the petitioner could have got an opportunity to explain the said circumstances or lead evidence. Without giving him an opportunity or even letting the petitioner know that statements were recorded, the Deputy Commissioner of Police has relied on statements of 11 persons. It is true that general allegations are only required to be made in the notice, but when statements are relied upon for the externment order, at least, the person to be affected by such order should be given an opportunity to explain the allegations in the statements. The petitioner was, therefore, deprived of the opportunity to explain the circumstances, which weighed considerably with the externing authority and, therefore, also the order is vitiated."

#. Considering the aforesaid aspect of the matter and considering the fact that the authority has considered the statements of the witnesses in the final order for which there is no reference in the show cause notice, in any manner, the order of externment is required to be set aside on the said ground, as, it can be said that the authority has travelled beyond the averments and allegations which are finding place in the show cause notice at the time of passing the final order. In that

view of the matter, this petition is allowed. The order of externment at Annexure-B as well as the order of the appellate authority at Annexure-C are quashed and set aside. Rule is made absolute accordingly. Direct service is permitted.

(P.B.Majmudar,J)

(pathan)